

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAMAL SYDNEY KITTRELL,

Defendant-Appellant.

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UNPUBLISHED

September 26, 2006

No. 260248

Wayne Circuit Court

LC No. 04-008675-01

Before: Davis, P.J., and Murphy and Schuette, JJ.

DAVIS, P.J. (*dissenting*).

I respectfully dissent. I believe that it is necessary to engage in considerable conjecture to conclude that the trial court's instructional error was not outcome determinative. The way to determine that issue beyond a reasonable doubt is to give defendant another trial with a proper instruction. Therefore, I would reverse and remand for a new trial.

I agree with the majority's recitation of the law applicable to our review of jury instructions. As the majority notes, instructional error is reviewed for harmlessness: reversal is unwarranted unless the defendant shows more probably than not that the error was outcome determinative, meaning the error undermined the reliability of the verdict. *People v Hawthorne*, 474 Mich 174, 181-182; 713 NW2d 724 (2006). I also agree with the majority's recitation of the salient facts. Although both victims consistently identified defendant as the perpetrator, they gave conflicting descriptions of the perpetrators to police, and those descriptions further differed from defendant's actual appearance on the day of his arrest, which was the day after the crime. The majority does not record that another witness who saw the robbers fleeing the scene testified that defendant was not among them.

I cannot conclude that the error here was harmless. This is not a situation in which the trial court merely *omitted* the instruction, in which case I would agree that the error would have been harmless. See *People v McDaniel*, 256 Mich App 165, 170; 662 NW2d 101 (2003), overruled on other grounds *People v Francisco*, 474 Mich 82, 85-88; 711 NW2d 44 (2006) ("Defendant's theory was before the court, and the presumption is that the jurors followed the court's instructions"). This is a situation where the trial court affirmatively *gave* an instruction that *logically precluded* the jury from considering defendant's core theory of his defense.

The majority does correctly note "that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant's primary theory of the

case was that the victims misidentified him, and defendant focused on the inconsistencies between defendant's appearance in court and the day after the robbery and the victims' descriptions of the perpetrator. Although it is certainly *possible* that the jury would have convicted defendant in any event, the trial court's instruction had the effect of eviscerating defendant's entire theory of the case. Interestingly, the codefendant for whom the instruction was properly given was acquitted.

The erroneous jury instruction, which the jury is presumed to have followed, effectively precluded defendant's defense and therefore undermined the reliability of the verdict. I would reverse and remand for a new trial on that basis.

/s/ Alton T. Davis